SUPREME COURT, U. S.

No. 428

Office-Supreme Court, U.S.
FILED
SEP 19 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

MONROE AUTO EQUIPMENT CO., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner company is engaged in the manufacture of automotive shock absorbers and related products at its plant in Hartwell, Georgia (R. 44; J.A. 23, 30).[1] In the middle of 1963, the United Auto Workers union began to organize the company's employees (R. 45; J.A. 23, 134-135). Subsequently, the union and the company agreed to a Board election (R. 46;

[1] "R" refers to volume I, Transcript of Record, and "J.A." refers to the transcript of testimony and the exhibits reproduced as a joint appendix in the court below, copies of which have been filed with this Court.

J.A. 13-14). Employees Hoke Smith and Charles Cleveland, the subjects of this unfair labor practice proceeding, were employees who had actively solicited employees to support the union, and were chosen by the union to act as its observers at the polls (R. 72; J.A. 25, 33-34, 91, 219). Shortly before the election, Smith and Cleveland met with management officials to check the voter eligibility list (J.A. 33, 25).[2]

2. On the first full working day after the election, Smith was transferred from the "A" line—where he had been working placing springs, washers and nuts on shock absorbers—to "pulling shocks" on the "main line" (R. 66, 68; J.A. 91, 103, 105, 114, 183-187, 201, 214).[3] The latter job requires considerably more physical effort than does work on the "A" line (R. 69; J.A. 70, 78, 79, 84), and is performed under conditions of extreme heat (R. 69; J.A. 136-137, 161, 92-93, 77, 109). Smith, who was 58 years old, replaced Weyman Risner, a man in his thirties, who was transferred to an easier job (R. 73-74; J.A. 97, 222-223).[4] A second employee who pulled shocks

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[2] The election was held as scheduled and the union lost. But, upon the union's objections that the company had improperly interfered with employee freedom of choice, the Board set the election aside (R. 46; J.A. 13-14).

[3] In his four years with the company, Smith had worked at various jobs (R. 67, 72; J.A. 79-90, 101-103). At one time he asked for and received a transfer to a night watchman's job which he held until it was abolished (R. 67; J.A. 102). On another occasion after he injured his hand working on a machine, he was given the job of running the burr roller and tumbler for two or three weeks (R. 67; J.A. 103, 113).

[4] Smith had occasionally done this work before, but only for short periods when extra help was needed (R. 69; J.A. 98-99, 102, 108-109).

with Smith was also in his thirties (Tr. 97, 210). Smith pulled shocks until Friday, July 31, when he became sick on the job because of the heat. He was given permission to leave early, and a few days later he entered a hospital where he was confined for nine days (R. 70; J.A. 93-95, 208-209). Risner returned to pulling shocks during much of Smith's absence (R. 74; J.A. 225-226).

When Smith returned on August 24, he was again assigned to pulling shocks with another employee (R. 70-71; J.A. 95-96, 209). He asked the plant superintendent whether he could have extra help when the line was loaded to high capacity, mentioning his recent illness and hospitalization (R. 70-71; J.A. 95-96, 209). The company had previously given employees, including Smith, easier jobs when appropriate (R. 74-75; J.A. 99, 137-138, 164; *supra*, p. 2 n. 3). The company also regularly supplied employees pulling shocks with extra help when they asked for it, and permitted the two employees working on the line to slow down until extra help arrived (R. 74; J.A. 171, 168, 175-176, 152-153, 154-155, 157-161, 169, 64, 70-78-79, 83-84, 96-99, 107-108, 183). Nevertheless, the superintendent told Smith that he was allowed only two men on the job and could not supply extra help (R. 71; J.A. 96, 210). Smith then told his foreman, who also knew of his prior illness, "I'll go up there and pull the shocks, as many as I can * * *. But I can't keep up with it when the line's loaded." The foreman said, "If you can't pull them, I don't need you", and Smith replied, "well you don't need me" (R. 71; J.A. 96, 210-211). Shortly thereafter, the

Company discharged Smith, giving as the reason that he refused an assigned job (R. 71; J.A. 97, 210).

3. Shortly before quitting time on August 10, two weeks after the election, the foreman of the painting department asked Cleveland and two other employees in that department to clean up the area in which they were working (R. 76, 77, 78; J.A. 29, 32-33, 62-63, 71, 74-75, 77-78). Cleveland, who had been with the company for seven years, took a broom and began sweeping (R. 75, 76, 77, 78; J.A. 22, 29, 33, 63, 71, 75, 77-78). But one of the other employees, Marvin Bryant, simply sat down and did nothing (R. 78; J.A. 32, 33, 48, 63, 76-77). When the quitting whistle blew, Cleveland, who had gathered a small pile of trash, stopped what he was doing and left (R. 77; J.A. 29-30, 45). To avoid paying overtime, the company has a rule that, when the quitting whistle blows, each worker should stop what he is doing and punch out (R. 77; J.A. 238, 30, 63, 77). Although the foreman was present throughout and observed what had happened, he said nothing (R. 78; J.A. 231-233, 237, 252-254, 249, 78). The next day, Cleveland was notified that he was suspended for not keeping his area "cleaned as instructed" (R. 76; J.A. 257-259). Bryant was not disciplined (R. 78; J.A. 78, 255). The company had never disciplined an employee for not completing the cleaning of his area, and Cleveland had never been warned that this was a punishable offense (R. 78; J.A. 31-32, 63, 78, 237-239).

4. On these facts, the Board found that the company transferred Smith to more arduous work and subsequently constructively discharged him, and sus-

pended Cleveland, because of their involvement with the union, thereby violating Section 8(a)(3) and (1) of the National Labor Relations Act (Pet. App. B. 17-18, 46, 49, 51-52). The Board ordered the company to cease and desist from the unfair labor practices found; to reinstate Smith to his former or a substantially equivalent position; to make him and Cleveland whole for lost wages; and to post the customary notices (Pet. App. B. 18, 50-51, 52-55). The court of appeals in a *per curiam* opinion held that the Board's findings were supported by substantial evidence and accordingly enforced its order (Pet. App. A. 15-16).

5. The only question presented by the petition is whether substantial evidence supports the Board's finding that the action taken by the company was motivated by its hostility toward the union activities of the two affected employees (see Pet. 2). The court of appeals, which has the principal responsibility for examining claims of insubstantiality of evidence, found that the record adequately supported the Board's inferences and findings. This issue warrants no re-examination by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. Nor is a different conclusion required even if, as petitioner now contends (Pet. 7), the Board's findings of discriminatory motivation were based on uncontroverted facts (but see Pet. App. A. 15-16; R. 72-74, 76-78). For the *Universal Camera* rule that a reviewing court may not "displace the Board's choice between two fairly conflicting views" (340 U.S. at 488) applies not only to basic evidentiary facts, but also to the inferences drawn from such facts. The court be-

low correctly understood that standard and reasonably applied it here (see Pet. App. A. 15-16).[5]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1968.

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[5] The court's decision in the instant case is not in conflict with *National Labor Relations Board* v. *Suniland Furniture Co.*, 387 F. 2d 123 (C.A. 5). There the Board's finding that an employee was discriminatorily discharged was based on its determination that certain remarks made by the employee which precipitated his discharge were protected as a matter of law. The court found that the remarks were not protected, and thus concluded that there was no substantial support for the Board's unfair labor practice finding (*id.*, at 124).

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